THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC. , Plaintiff, v. PC TOOLS PTY LTD, Defendant.	Case No. 07-CV-00797 JCC **PC TOOLS' MOTION TO DISMISS** **NOTE FOR MOTION CALENDAR: September 7, 2007**

This Court previously denied Zango's motion for temporary restraining order, in part because the Court found that Zango was unlikely to prevail on the merits of its claims. *See* June 5, 2007 Order ("Order") at 6-8. The Court recently found that personal jurisdiction over PC Tools exists; PC Tools now requests dismissal of Zango's claims as a matter of law.

Zango asserts claims for tortious interference with contract, violation of the Washington Consumer Protection Act, trade libel, and unjust enrichment. Each of these claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim because even if Zango's allegations are accepted as true, PC Tools is not liable on Zango's claims as a matter of law.[1] PC Tools' identification and classification of Zango's software is: (a) immune

[1] For purposes of a Rule 12(b)(6) motion, the Court must accept the allegations made in the Complaint as true. PC Tools does not waive its right to contest Zango's allegations if necessary.

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from liability under the Communications Decency Act, *see* 47 U.S.C. § 230(c)(2); and (b) protected free speech under the First Amendment, including the common interest privilege.

ZANGO'S ALLEGATIONS AND RELEVANT EARLIER FINDINGS

Zango alleges that it makes software providing consumers with free access to a large catalog of online videos, games, music, tools and utilities. Complaint at ¶ 5. Zango says its software displays advertisements to users while they are browsing or searching the Internet online. Complaint at ¶ 6. (These are commonly referred to as "pop-up ads.") Zango says its software reads keywords from users' Internet browsing, allegedly to decide what pop-up ads to display to users while they are on the Internet. Complaint at ¶ 6.

PC Tools develops and sells various computer protection and security software programs, including an anti-spyware program called Spyware Doctor that protects against privacy and tracking threats. Complaint at ¶ 8. Certain of Zango's software is listed in Spyware Doctor's detection database. Complaint at ¶ 13. Spyware Doctor identified certain of Zango's software as an "infection" engaged in a "malicious action" that represents an "elevated risk." Complaint at ¶ 12. Spyware Doctor publishes these statements to its users. Complaint at ¶ 27.

The TRO proceedings earlier in this case showed that Spyware Doctor detects, and at user request deletes, potentially harmful software. Order at 1-2. Spyware Doctor classifies potentially dangerous or annoying software into various categories ranging from potentially unwanted applications to low, medium, elevated, and high risk software. Order at 2. Spyware Doctor Starter Edition can be downloaded and installed from Google's website. Court's Order at 2. Users knowingly download Spyware Doctor to avoid potential malware, relying on PC Tools' expertise in identifying and blocking malware. Order at 7.

Earlier this year, Zango settled a formal FTC complaint alleging, among other things: (a) that Zango's software exploited security vulnerabilities in Web browsers to install adware on users' computers via "drive-by" downloads; and (b) that millions of consumers received pop-up ads without knowing why, and had their Internet usage monitored without their knowledge.

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Order at 3. Many companies similarly situated to PC Tools block Zango's software. Order at 7. Allowing companies like PC Tools to exercise judgment to avoid the well-documented harm of malware is decidedly in the public interest. Order at 7.

ARGUMENT

Zango asserts claims for tortious interference with contract, violation of the Washington Consumer Protection Act, trade libel, and unjust enrichment. Each of these claims should be dismissed because, even accepting Zango's allegations as true, PC Tools is not liable on Zango's claims as a matter of law. PC Tools' detection and classification of Zango's software is immune from liability under the Communications Decency Act, 47 U.S.C. § 230(c)(2), and is protected free speech under the First Amendment.

Zango's complaint also should be dismissed because, accepting its allegations as true, it fails to state a claim upon which relief may be granted. *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006). The Court may reject allegations that are conclusory, contradictory or that are based on unwarranted deductions of fact or unreasonable inferences. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004). And the Court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. *Id*.

I. PC TOOLS' DETECTION AND IDENTIFICATION OF ZANGO'S SOFTWARE IS IMMUNE FROM LIABILITY UNDER THE COMMUNICATIONS DECENCY ACT, 47 U.S.C. § 230(C)(2).

The Communications Decency Act (CDA), 47 U.S.C. § 230(c)(2), shields PC Tools from liability for providing an interactive software product that identifies potential malware, notifies computer users of the malware, and enables them to allow or disallow content associated with the malware. CDA Section 230 is entitled "Protection for Private Blocking and Screening of Offensive Material." PC Tools' Spyware Doctor is security software directed to that very function: allowing computer users to privately block and screen offensive material. Computer users demand such products to protect themselves against the omnipresent, and mostly

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surreptitious, software threats circulating on the Internet. Because software threats are ever-changing, consumers demand an interactive product that enables them to connect to databases over the Internet and receive the latest lists of identified threats. After users install Spyware Doctor, Spyware Doctor accesses and communicates with PC Tools' servers, which house the detection databases. As frequently as daily and sometimes more frequently, PC Tools loads "signatures" (codes identifying new threats or reclassifying previously known threats) into its detection databases, which signatures are then downloaded from PC Tools' servers to Spyware Doctor on users' computers. *See* Berretta Declaration filed in Support of Zango's Motion for Temporary Restraining Order at ¶¶ 14-15.

In reaction to software threats distributed via the Internet, Congress promulgated the CDA, which states that it is the policy of the United States:

> to promote the continued development of the Internet and other interactive computer services and other interactive media;
>
> to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
>
> to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; and
>
> to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.

47 U.S.C. 230(b)(1)-(4).

In furtherance of this public policy, subsection (c)(2) provides a safe harbor from civil liability for software providers like PC Tools:

> No provider or user of an interactive computer service shall be held liable on account of --
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to

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> be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C. § 230(c)(2). An "interactive computer service" is any "information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). The term "access software provider," in turn, is a provider of software or enabling tools that, among other things, "filter, screen, allow, or disallow content." *Id.* at § 230 (f)(4)(A).

PC Tools is an access software provider because Spyware Doctor is software (or a tool) that enables users to "filter, screen, allow, or disallow content" at their discretion. PC Tools is an interactive computer service because PC Tools "provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). After users install Spyware Doctor on their computers, the software provides or enables computer access by each user to PC Tools' detection databases on computer servers over the Internet, which then downloads the latest updates ("signatures") to the users' computers. *See* Berretta Declaration filed in Support of Zango's Motion for Temporary Restraining Order at ¶¶ 14-15. PC Tools updates its detection databases regularly (as frequently as daily and sometimes more frequently). *See* Berretta Declaration filed in Support of Zango's Motion for Temporary Restraining Order at ¶¶ 14-15. The Spyware Doctor software residing on users' computers then accesses and connects with the detection databases on PC Tools' servers and downloads the updates. *See* Berretta Declaration filed in Support of Zango's Motion for Temporary Restraining Order at ¶¶ 14-15. Users automatically receive updates, and at any time may actively request information from PC Tools' servers to update their listing of malware "signatures" from PC Tools' detection databases. The ability of Spyware Doctor to effectively identify, categorize, and remove malware would be eliminated if

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Spyware Doctor did not regularly access the detection databases on PC Tools' computer servers over the Internet to download the latest updates.

PC Tools' identification and classification of software such as Zango's software falls directly within the scope of immunity stated in both 47 U.S.C. § 230(c)(2)(A) and (B). As an interactive computer service, PC Tools in good faith restricts access to or availability of material that PC Tools or its users consider to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable. 47 U.S.C. § 230(c)(2)(A). And PC Tools enables or makes available to others the technical means to restrict access to such objectionable material. 47 U.S.C. § 230(c)(2)(B). There is no dispute that Zango's software is, or provides access to, material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Zango cannot, and has not, disputed (1) the content or scope of the FTC consent order; or (2) that its software provides access to pornographic websites and content. *See Dreiling v. American Exp. Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (holding that on a Rule 12(b)(6) motion, court may consider any matter subject to judicial notice).

Given the important public policy served by the CDA and the broad language used to define its coverage, the Ninth Circuit considers the scope of immunity under § 230(c) to be "quite robust." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). The term "interactive computer service" is not limited to traditional Internet service providers, like America Online. *Batzel v. Smith*, 333 F.3d 1018, 1030 and n.15 (9th Cir. 2003) (safe harbor provision is applied to cover a broad range of "cyberspace services" and is not limited to services that provide access to the Internet as a whole). Earlier this year, a court determined that § 230(c)(2) immunizes a provider of anti-malware software. *See Pallorium, Inc. v. Jared*, No. G036124, 2007 WL 80955 (Cal. Ct. App. Jan. 11, 2007).[2]

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[2] *Pallorium* is unpublished and thus not citable precedent in California tribunals. Given that there are few cases interpreting § 230(c)(2), however, and given its factual similarity to this case, PC Tools respectfully requests that the Court consider Pallorium as instructive or illustrative. A copy is attached hereto.

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In sum, PC Tools distributes security software that in good faith allows users to restrict access to and availability of objectionable material, such as malicious, harmful, unwanted or unsolicited software programs. These programs may include damaging items such as Trojans, keyloggers, browser hijackers, cookies, and other potentially unwanted or objectionable material.[3] Spyware Doctor scans the user's computer and compares its contents with the lists of signatures interactively downloaded from the databases housed on PC Tools' servers. Under the plain language of the CDA, PC Tools is immune from the claims asserted by Zango in this case.

II. PC TOOLS' DETECTION AND CLASSIFICATION OF SOFTWARE PROGRAMS, INCLUDING ZANGO'S, ARE PROTECTED BY THE COMMON INTEREST PRIVILEGE AND THE FIRST AMENDMENT.

Zango's claims challenge PC Tools' opinions of certain Zango software as potentially harmful or risky software, as such communications are made between PC Tools and users of its anti-malware program Spyware Doctor. PC Tools' opinions regarding Zango's software is speech protected under the common interest privilege stemming from the First Amendment. Zango's claims must be dismissed.

Under the common interest doctrine, statements are conditionally privileged when the speaker and recipient have a common interest in the subject of the communication and need to speak freely about it. *See, e.g., Ward v. Painters Local Union No. 300*, 41 Wash2d 859, 865-66, 252 P.2d 253 (1953) (recognizing common interest privilege); *Nichols v. J.J. Newberry Co.*, 150 F.2d 15, 17 (9th Cir. 1945) (store's posting of alleged check forger's photo was privileged and not libelous); Restatement (First) of Torts, § 596. In this case, PC Tools and its customers have a common interest in communicating about potential malware threats and in protecting the security

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[3] Zango's adware need not display pornographic pop-ups for it to be considered objectionable under the statute. In *Langdon v. Google, Inc.*, 474 F. Supp.2d 622, 631 (D. Del. 2007), the court held that Google and other defendants were immune under the CDA for blocking website ads. Even though the ads were not obscene, they were, under § 230(c)(2)(A), "otherwise objectionable." Accordingly, even if Zango's software did not display pornographic pop-ups (although it certainly does), its adware still can be deemed "otherwise objectionable." Without dispute, the adware causes "pop-up" ads to appear while a user is surfing the Internet.

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of their computers. PC Tools' business is premised on the goal of keeping its customers fully informed. Such communications are privileged and cannot form the basis for legal claims. *See, e.g., KinderStart.com, LLC v. Google, Inc.*, No. C 06-2057 JF, 2007 WL 831806 at *19-21 (N.D. Cal., March 16, 2007) (dismissing libel claims under Rule 12(b)(6) because, *inter alia*, the common interest privilege immunized Google's unfavorable ranking of the plaintiff's website; subscribers to Google's ranking service were entitled to Google's opinion on websites).

Users of PC Tools' software are like the Google subscribers in the *KinderStart.com* case. When users purchase or install Spyware Doctor, they are buying and asking for PC Tools' opinion on potential threats. Spyware Doctor gives that opinion. Spyware Doctor evaluates software residing on a user's computer, detects any malware, and quarantines, removes or restores it based on the user's choice. As statements of opinion, not fact, the statements are privileged and are not tortious, whether the asserted claim be (as Zango asserts): tortious interference, violation of a consumer protection act, trade libel, or unjust enrichment. Such protection has been found in cases involving statements by competitors. *See, e.g., Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1285-1290 (4th Cir. 1987) (statement by plaintiff's competitor to distributors that plaintiff's tests misrepresented the quality of the plaintiff's products was opinion, especially considering the statement's wording and context). Here, there is even more reason to protect PC Tools' opinions – PC Tools does not compete with Zango or have any pecuniary interest in the rating it assigns to Zango's software.

Zango may attempt to argue that PC Tools' conduct is not privileged based on the March 28, 2007 email referenced in Zango's Complaint. The email chain including the March 28, 2007 email is attached hereto as Exhibit 1. *See In re Stac Electronics Securities Litigation*, 89 F.3d 1399, 1405 (9th Cir. 1996) ("[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.") (citation omitted). The very email cited by Zango reveals that upon reaching its conclusion concerning the particular Zango

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software addressed in the email – www.seekmo.com ("Seekmo") – PC Tools reclassified Seekmo in PC Tools' detection database. Zango's response indicates that it was very thankful and took no issue with this particular decision. Ex. 1 at 49. Plainly, Zango's claims cannot be based on PC Tools' treatment of Seekmo.

Beyond the Seekmo software, a simple review of the entire chain of emails before the statement, after the statement, and within the very email from which Zango isolates and extracts the statement, plainly shows there were many qualifiers to Meem's statement and that in no way was Meem's statement a proclamation that all of Zango's programs were without risk. Meem's statements in no way abrogated PC Tools' privilege. The First Amendment's common interest privilege applies to PC Tools' opinions concerning Zango's software, and Zango's Complaint must be dismissed.

III. ZANGO'S TORTIOUS INTERFERENCE CLAIM MUST BE DISMISSED BECAUSE ZANGO HAS NOT PLED THAT PC TOOLS INTERFERED WITH ZANGO'S CONTRACTUAL RIGHTS OR BUSINESS EXPECTANCY OR THAT PC TOOLS HAD AN IMPROPER MOTIVE.

Under Washington law, a claim for tortious interference with contractual rights or business expectancy requires proof of five elements: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendant had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendant interfered for an improper purpose or used improper means; and (5) resultant damage. *Leingang v. Pierce County Med.Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288, 300 (1997). Intentional interference means purposeful improper interference. *See also Hairston v. Pacific-10 Conference*, 893 F.Supp. 1485, 1494 (W.D. Wash. 1994) ("the alleged interference must be intentional, not merely an incidental, indirect result of another act"). And the interference must be improper – meaning interference with an improper objective or the use of wrongful means. *Id.*

Assuming, *arguendo*, that Zango has properly pled that it had a contractual relationship or business expectancy with its customers and that PC Tools had knowledge of this relationship,

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Zango has not alleged – nor can it – that PC Tools intentionally interfered with Zango's contractual or prospective relationships and that such alleged interference by PC Tools was improper. As alleged in the Complaint, PC Tools provides computer protection and security software that is designed to ensure that its users' computers are secure from malware. PC Tools is neither taking specific aim at Zango's software, nor attempting to target Zango's operations. It has no reason to. The companies are not competitors. Instead, PC Tools makes a classification decision with respect to Zango's software that is just one out of tens of thousands of classification decisions made by PC Tools with respect to software programs it has analyzed and continues to analyze. *Restatement (Second) of Torts* § 767 cmt c (indicating that courts are concerned with unlawful or fraudulent behavior that targets the plaintiff and only the plaintiff). Because it is merely incidental that PC Tools' classification decisions impact Zango, Zango cannot establish that PC Tools is intentionally interfering with Zango's contractual relationships or business expectancy.

Further, PC Tools' classification decisions with respect to Zango's software are not in any way improper. Instead, PC Tools has made its decision in response to overwhelming evidence that Zango's software has attributes of malware. Given Zango's long history of abuses and the elaborate steps PC Tools has taken to analyze and evaluate Zango's current software, it is beyond cavil that PC Tools' objective is not improper.

Zango has not alleged facts supporting these essential elements of its tortious interference claim because it cannot. The claim must be dismissed.

IV. ZANGO'S CONSUMER PROTECTION ACT CLAIM MUST BE DISMISSED.

Under the Washington Consumer Protection Act, a plaintiff must prove five elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). As to the first element, the Act does not define the term "deceptive," but implicit in that term is "the

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understanding that the actor misrepresented something of material importance." *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998) (emphasis removed), *rev'd on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999). A plaintiff must show at a minimum that the act in question had the capacity to deceive a substantial portion of the public. *See Hangman Ridge Training Stables.*, 105 Wn.2d at 785-86, 719 P.2d at 531.

Zango has not pled – nor can it – that PC Tools' classification of Zango's software is deceptive or that it causes an adverse public impact. On the contrary, public policy favors dismissal of the Consumer Protection Act claim. Because typical users have great difficulty removing malware from their computers, anti-malware software like PC Tools' Spyware Doctor provides crucial assistance to keeping users' computers operational and reliable. Anti-spyware software therefore serves an important public function. Just as public policy is served by deferring to the editorial opinions, recommendations and ratings issued by publications like *Consumer Reports*, public policy is served in this case by allowing PC Tools to continue its practice of independently analyzing and rating software programs like those distributed by Zango. The public is not being deceived by PC Tools; to the contrary, PC Tools gives the public solid opinions based on extensive research conducted by PC Tools. The users ultimately may choose to accept or reject PC Tools' opinions. Zango's WCPA claim fails on its face.

V. ZANGO HAS NOT PROPERLY PLED FACTS SUPPORTING ITS TRADE LIBEL CLAIM.

To establish a claim of product disparagement, also known as trade libel, a plaintiff must establish that the defendant (1) published a knowingly false statement harmful to the interests of another; and (2) intended the publication to harm the plaintiff's pecuniary interests. *Auvil v. CBS 60 Minutes*, 67 F.3d 816, 820 (9th Cir. 1995).

As an initial matter, no Washington court ever has recognized the claim of trade libel. Instead, the Ninth Circuit merely has assumed that the Washington Supreme Court would recognize the claim based on a citation in a Washington Court of Appeals decision to Section 623A of the Restatement (Second) of Torts. *See Auvil*, 67 F.3d at 820.

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In any event, Zango has not properly pled its trade libel claim. For example, Zango has not pled that PC Tools' classification of Zango's software is a statement of fact, not non-actionable opinion. Similarly, Zango has not alleged that PC Tools made its classification decision with the intent to harm Zango's pecuniary interest. Nor can it. PC Tools' revenue does not depend on how it rates Zango's software, and PC Tools and Zango do not compete in the same market. The trade libel claim must be dismissed.

VI. ZANGO HAS NOT PROPERLY PLED FACTS SUPPORTING ITS UNJUST ENRICHMENT CLAIM.

To establish a claim for unjust enrichment, a plaintiff must establish must plead and prove: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit. *Orser v. Select Portfolio Servicing, Inc.*, 2005 WL 3478126, *4 (W.D. Wash. 2005); *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 810 P.2d 12, 18 (1991).

Here, Zango has not alleged – nor can it – that it conferred any benefit on PC Tools or that PC Tools has appreciated or has knowledge of any such benefit. Zango has conferred no benefit on PC Tools. Indeed, the version of Spyware Doctor that Zango puts at issue is a free version downloaded as part of the Google Pack. On the contrary, Zango's unwarranted demands and pursuit of this lawsuit have been to the great detriment of PC Tools in terms of legal fees incurred and time lost investigating and responding to Zango's allegations. The unjust enrichment claim must be dismissed.

WHEREFORE, PC Tools requests that the Court grant this Motion to Dismiss, dismiss PC Tools from this case, award PC Tools its fees and costs, and grant PC Tools all other relief to which it may be entitled.

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Dated August 14, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2007, I caused to be served a true copy of the foregoing document on the following via U.S. Mail:

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